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In The Supreme Court of The United States

ASID MOHAMAD, *ET AL.*, *Petitioners,*

v.

PALESTINIAN AUTHORITY AND PALESTINE LIBERATION ORGANIZATION, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

ESTHER KIOBEL, *ET AL.*, *Petitioners,*

v.

ROYAL DUTCH PETROLEUM CO., *ET AL.*, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF JOSEPH E. STIGLITZ AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF JOSEPH E. STIGLITZ AS *AMICUS CURIAE*

This brief *amicus curiae* is respectfully submitted by Joseph E. Stiglitz, professor of economics at Columbia University. [1] Professor Stiglitz has extensive expertise in economic theory and global economic development.

Amicus wishes to clarify central principles of business investment and economic development relevant to the question of corporate liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and the Torture Victims Protection Act ("TVPA"), 28 U.S.C. § 1350 note, presented in the cases before the Court, and address arguments, presented by *amici* in similar ATS cases, that corporate liability will adversely affect investment both in the United States and abroad and undermine the competitiveness of U.S. corporations.[2]

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[1] Pursuant to Rule 37.3 of this Court, all parties have consented to the filing of this brief. Letters providing such consent have been filed with the Clerk of the Court. And pursuant to Rule 37.6, *Amicus Curiae* certifies that no counsel for any party authored this brief in whole or in part, and neither counsel for any party nor any party itself provided a monetary contribution to support preparation of this brief. Further, no person or entity provided monetary contributions in support of this brief. *Amicus Curiae* prepared this brief with the *pro bono* assistance of Dr. Michael Cragg, Dr. Lisa Cameron, and Mr. David Hutchings of the Brattle Group, Dr. Arjun Jayadev of the University of Massachusetts, Boston, and Ms. Elizabeth Johnston, Esq., of the George Washington University.

[2] *See, e.g., Flomo v. Firestone Nat'l Rubber Co., LLC*, 643 F.3d 1013, 1021 (7th Cir. 2011) (Posner J.) (dismissing

Amicus previously submitted his views on the economic impacts of other litigation involving the ATS to the U.S. Court of Appeals for the Second Circuit.[3] *Amicus* reiterates his views here that there is no foundation for arguments asserting that potential liability under the ATS deters mutually advantageous and constructive foreign investment and trade.

Amicus previously taught at Princeton University, Stanford University, Yale University, and the Massachusetts Institute of Technology. In 2001, he was awarded the Nobel Prize in Economic Sciences for his analyses of markets with asymmetric information. He was a lead author of the

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amicus's "seemingly not tongue in cheek" argument "that corporations shouldn't be liable under the Alien Tort Statute because that would be bad for business"); Br. for Chamber of Commerce of the U.S.A. as *Amicus Curiae* in Supp. of Defs.-Appellees, *Flomo*, 643 F.3d 1013 (7th Cir. 2011) (No. 10-3675) ("*Flomo* Chamber Br."), 2011 WL 2452309, at *22–25; Br. for The Chamber of Commerce of the U.S.A. & Nat'l Foreign Trade Council as *Amicus Curiae* in Supp. of Defs.-Appellees at 7–25, *Doe v. Nestle, U.S.A., Inc., et al.*, No. 10-56739 (9th Cir. Oct. 7, 2011) ("*Nestle* Chamber Br."); Br. for U.S. Council for Int'l Business as *Amicus Curiae* in Supp. of Defs.-Appellees at 29–31, *Doe v. Nestle, U.S.A., Inc., et al.*, No. 10-56739 (9th Cir. Oct. 7, 2011) ("Council Br."). Additionally, Judge Jacobs, in his concurrence with the *Kiobel* panel's denial of rehearing, asserted that corporate liability would "beggar" corporations. *See Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 268, 270 (2d Cir. 2011) (Jacobs, J., concurring).

[3] Br. for *Amicus Curiae* Joseph E. Stiglitz in Supp. of Pls.-Appellees, *Balintulo v. Daimler AG*, No. 09-2778-CV (2d Cir. Nov. 30, 2009), 2009 WL 7768608.

1995 Report of Intergovernmental Panel on Climate Changes, which shared the 2007 Nobel Peace Prize.

Amicus served as a member of the Council of Economic Advisers from 1993 to 1995, and as its chairman from 1995 to 1997. He was Chief Economist and Senior Vice President of the World Bank from 1997 to 2000. In 2009, he was appointed by the President of the United Nations General Assembly to chair the Commission of Experts on Reform of the International Financial and Monetary System.

Amicus founded the *Journal of Economic Perspectives* of the American Economic Association, co-founded the *Journal of Globalization and Development* and *Economists' Voice,* and has authored or co-authored leading economics texts including: *Economics of the Public Sector*; *Economics*; *Principles of Macroeconomics*; and *Principles of Microeconomics*. He has authored or co-authored the following popular and scholarly titles: *Globalization and Its Discontents*; *The Roaring Nineties*; *Towards a New Paradigm in Monetary Economics*; *Fair Trade for All*; *Making Globalization Work*; *The Three Trillion Dollar War: The True Cost of the Iraq Conflict*; *Stability with Growth*; *Peasants vs. City Dwellers: Taxation and the Burden of Economic Development*; and *Freefall: America, Free Markets, and the Sinking of the Global Economy*.

SUMMARY OF ARGUMENT

These cases present the question of whether a corporation can be liable under the ATS and the TVPA for a violation of customary international law.[4] In addition to questions involving statutory interpretation and international law that these cases present, some have raised a variety of policy questions concerning corporate liability under the ATS. Persistent among these is the question whether the ATS is, simply put, "bad for business." *See Flomo v. Firestone Nat'l Rubber Co., LLC*, 643 F.3d 1013, 1021 (7th Cir. 2011) (Posner, J.).[5]

Specifically, opponents of corporate liability have argued that ATS litigation against corporations will: (1) drive corporations away from less developed countries ("LDCs"), thus undermining their progress; (2) place U.S. businesses at a competitive disadvantage because, *inter alia*, some of their competitors are beyond the reach of the law; and (3) deter foreign investment in the United States as foreign corporations seek to avoid the jurisdiction of

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[4] Though, for simplicity's sake, *Amicus* directs his arguments in the remainder of this brief to the ATS, they apply with equal force to corporate liability under the TVPA and thus to the issues presented in *Mohamad v. Palestinian Authority and Palestine Liberation Organization*, No. 11-88, argued in tandem with this case. *Amicus* thus submits this brief in support of Petitioners in both *Kiobel* and *Mohamad*.

[5] *See also Kiobel*, 642 F.3d at 270 (Jacobs, J. concurring) (voicing concern that ATS would "beggar" foreign corporations).

U.S. courts.[6] These arguments are without merit, and the Court should reject them as a policy basis for restraining the reach of the ATS and the TVPA.

As an initial matter, corporate liability under the ATS provides an efficient mechanism for addressing human rights violations, particularly where local regulatory systems and judicial enforcement mechanisms are weak or non-existent. With recognition of corporate liability for ATS claims, those with the most information about the harm—the victims—have the greatest incentive to enforce compliance. And corporations that are in the best position to monitor compliance have a strong incentive to police their own conduct. Transaction costs associated with enforcing customary international law prohibiting the most egregious human rights violations are thus reduced.

In addition to efficiency advantages, corporate liability under the ATS would promote long-term economic development and foreign direct investment in LDCs. Concern that the expected cost of potential future ATS suits will cause corporations to withdraw from LDCs appears to be little more than hyperbole, lacking empirical support. The risk of liability—*any* liability—is just one among many considerations that drive investment decisions. And although corporations have faced the specter of ATS liability for more than a decade, there is little empirical evidence that it has had any impact on foreign direct

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[6] *Flomo* Chamber Br., 2011 WL 2452309, at *23–25; *Nestle* Chamber Br. at 7–25; Council Br. at 29–31.

investment. Instead, continued investment in LDCs by corporations that have incentives to meet international human rights standards can be expected to result in improved human rights conditions. Such conditions foster stability and long-term economic development and attract foreign direct investment.

Further, concerns that U.S. firms subject to ATS liability would be disadvantaged relative to their competitors not subject to jurisdiction here are overblown. First, without the ATS, U.S. corporations may face *greater* risk of tort liability than their foreign counterparts doing business here. This is because litigants may turn to state common law to enforce human rights standards and states may seek to police the conduct of their corporate citizens. Second, U.S. corporations whose conduct comports with customary international law may experience a competitive advantage because their competitors' costs of compliance will be higher than their own. Third, corporations subject to liability may experience greater access to foreign markets where LDC governments that lack strong enforcement mechanisms nevertheless seek investment by corporations more likely to adhere to international human rights standards. Fourth, even if recognition of corporate liability under the ATS were to cause U.S. corporations to disinvest in LDCs with poor human rights records, that short-term disinvestment should be more than offset by long-term improvements in LDCs' economic and social climate, which the ATS encourages and which ultimately benefit U.S. corporations.

Finally, the argument that the risk of being subject to the jurisdiction of our courts under the ATS would deter foreign investment in the United States is implausible. The risk of liability is tightly constrained by the limited range of claims actionable under that statute. Foreign investors balancing that risk against other investment-driving factors, such as the United States' sophisticated capital markets and educated labor force, will continue to find the United States an attractive market. And even were disinvestment to occur, the gap would be filled by increased investment by U.S. firms, with no significant negative effect on the economy.

ARGUMENT

I. TORT LIABILITY CREATES APPROPRIATE INCENTIVES THAT ENHANCE ECONOMIC EFFICIENCIES.

Tort law represents an important part of our economic system. It provides incentives for appropriate behavior by requiring those who injure others (*i.e.*, those who commit tortious violations of law), to pay damages to those whom they have harmed. Opening the door to corporate liability under the ATS would be bad for *bad* businesses. However, discouraging conduct that violates human rights—as in this case—and other customary international law embodies the very purpose of tort law. It requires firms to internalize the costs that their harmful acts impose on others.

Tort law functions as a complement to other mechanisms, including regulation and taxation, created to deal with negative externalities [7] and current and future infractions of law. Regulations can prevent only some violations from occurring and, in the absence of an omniscient and omnipotent regulator, persons and companies can cause harm to others. In such situations, tort law empowers those with the most information about the harm with the ability to seek redress. The knowledge that such redress is available provides incentives for market participants not to engage in injurious behavior. [8]

In the case of corporate liability under ATS, the fact that private parties can seek redress is particularly advantageous. This is because the harmful acts at issue are the most egregious torts in

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[7] A negative externality occurs when the actions of one party cause harm that is neither compensated by enforcing private rights nor adequately addressed by public law means.

[8] The notion that corporate liability will impose discipline on investors and lenders is parallel to the doctrine of odious debt. That doctrine has a long history, beginning with the arguments of Alexander Sack in the 1920s and continuing today. It suggests that sovereign debt incurred under illegitimate regimes should not be held to be repayable to creditors because they were debts not taken in the name of the public benefit. *See generally* Seema Jayachandran & Michael Kremer, *Odious Debt*, 96(1) Am. Econ. Rev. 82, 82–92 (2006). The existence of credible ex post sanctions against lenders provides lenders and investors with incentives to pursue their activities in ways that do not violate international law or embolden illegitimate regimes. Corporate liability under the ATS creates similar incentives.

violation of customary international law. These egregious violations may occur in locations in which domestic courts provide an inadequate forum for pursuing and/or enforcing tort claims, while other forms of sanctions, such as regulation and taxes, are weakly applied.

Moreover, it is now well-recognized that in a modern economy, the provision of appropriate incentives (to avoid injury to others) *must* extend beyond the imposition of liability to the person who commits the injury. In particular, corporations must be provided with incentives to discourage and deter their employees from engaging in such potentially harmful acts and to develop monitoring systems that ensure compliance with corporate policies. With corporations in the best position to monitor such activities, this approach can minimize transactions costs. In addition, the limited resources of persons—as compared to those of the corporations for which they work—would attenuate the effectiveness of a system that imposes liability on persons alone. Recognizing corporate liability under the ATS thus enhances the efficiency of economic activity.

Furthermore, recognition of corporate liability would demonstrate commitment to a variety of widely shared principles and morals. The liability imposed by the ATS reflects norms of human rights endorsed by international law. The United States values, and benefits from, the existence of such international norms. And the enforcement of these norms by the United States confirms and promotes their universality.

II. CORPORATE LIABILITY UNDER THE ATS PROMOTES LONG-TERM ECONOMIC DEVELOPMENT AND FOREIGN DIRECT INVESTMENT IN LDCS.

Opponents of corporate liability under the ATS contend that providing for corporate accountability for human rights violations will impede commerce and harm LDCs that rely on valuable foreign direct investment ("FDI") for their economic and social development. But, as detailed below, this assertion rests on at least three implicit assumptions contradicted by the available empirical evidence and sound economic principles. *Amicus* discusses each of these implicit assumptions below.

First, proponents of this argument assert that imposing liability on corporations for their involvement in the most egregious human rights violations will induce them to exit LDCs in which they had invested or to refrain from investing in LDCs where they may be implicated in human rights violations. This claim lacks any empirical support. In fact, although victims have used the ATS as a means to enforce violations of human rights for the last 30 years[9] and courts have assumed for the last decade that corporations may be subject to ATS liability,[10]

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[9] *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004) (recognizing *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), as the first of a modern series of cases applying the ATS).

[10] *See Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 57 (D.C. Cir. 2011) ("The issue of corporate liability has remained in the background during the thirty years since the Second

to date, no study has shown that this source of liability has reduced investment in LDCs. Indeed, dire predictions of the impact of the ATS have simply not materialized. *See* Robert Knowles, *A Realist Defense of the Alien Tort Statute*, 88 Wash. U. L. Rev. 1117, 1156–59 (2011) (discussing Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *Awakening Monster: The Alien Tort Statute of 1789* (Inst. for Int'l Econ. 2003), and noting those authors' predictions that the ATS would depress worldwide trade by 10 percent, cause a 25 percent loss of FDI in target countries, and cost the United States hundreds of thousands of manufacturing jobs have not materialized).[11]

Circuit decided *Filartiga*, while numerous courts have considered cases against corporations or other juridical entities under the ATS without any indication that the issue was in controversy, whether in ruling that ATS cases could proceed or that they could not on other grounds.") (citation omitted).

[11] Some opponents of corporate liability under the ATS have suggested Talisman Energy divested its oil operations in Sudan because of ATS litigation against it for complicity in human rights violations by the Sudan government. *See, e.g.*, Br. for the Chamber of Commerce as *Amicus Curiae* in Supp. of Defs.-Appellants at 28, *Balintulo v. Daimler AG*, No. 09-2778-CV (2d Cir. Aug. 24, 2009) (arguing that the "ATS suit . . . caused the company to divest even though [the] court ultimately dismissed the suit." (citing Stephen J. Kobrin, *Oil and Politics: Talisman Energy and Sudan*, 36 N.Y.U. J. Int'l L. & Pol. 425, 426 (2004)). Talisman's decision, however, was influenced by a range of factors: a complex web of political risks that had adverse economic and public relations outcomes for Talisman. Among them were the Canadian government's investigation of Talisman's operations in the Sudan and the pressure it placed on the company, the United States' designation of

This is not surprising given the many considerations driving corporate investment decisions. These considerations include: the overall business climate; access to infrastructure, capital, labor, and natural resources; governmental attitudes towards business; and broader social and political stability. The risk of civil liability, of any type, is just one among many cost considerations that corporations evaluate in assessing the likely return on any investment. Ultimately, profitability drives the investment decision, and is thus necessarily fact-specific, defying any generalized prediction about the impact of exposure to ATS liability on FDI in LDCs generally.

In fact, most firms disavow engaging in such abhorrent behavior, especially publicly listed firms that are subject to close public scrutiny. They know the pressure that will be brought to bear should they engage in such behavior. For these responsible firms, the ATS is welcome: it does not circumscribe their behavior, but instead may help create a more level playing field on which they can compete against firms that do not face such scrutiny.

Second, this argument assumes that economic development is unrelated to respect for human

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Sudan as a state-sponsor of terrorism, and a campaign by nongovernmental organizations targeted at the U.S. and Canadian governments and Talisman's shareholders that ultimately caused several of Talisman's large institutional investors to sell their shares and significantly affected the company's share price and enterprise value. *See* Kobrin, *supra*, at 439–50, 455.

rights. But several economic studies show that respect for civil liberties and human rights are associated with improved economic performance. Perhaps the most compelling evidence on this point comes from work done at the World Bank while *Amicus* was Chief Economist there. That study, by Isham, Kaufmann, and Pritchett, examined the performance of World Bank-financed projects in countries with stronger and weaker civil liberties. *See* Jonathan Isham, *et al.*, *Civil Liberties, Democracy, and the Performance of Government Projects*, 11 The World Bank Econ. Rev. 219. (1997).[12] It found that economic returns to projects were systematically higher in countries that had higher scores on indices of human rights and civil liberties. Isham, *et al.*, *supra* at 229–30. Hence, the recognition of corporate liability under the ATS, which creates incentives for compliance with customary international law, promotes an environment that fosters economic development in LDCs.

Third, this claim assumes that high standards for human rights erode an LDC's competitiveness in attracting capital and economic activity. This assumption is contradicted, however, by the available empirical evidence on human rights and FDI, which suggests strongly that foreign capital flows to countries that have respect for human rights. Blanton and Blanton (2007) provide the most

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[12] The focus on World Bank projects removed any variation in effects that might arise from studying projects financed by different investors.

extensive examination of the impact of human rights legislation on FDI. They conclude that:

> Directly, respect for human rights reduces risk to FDI as it signals enhanced political stability and predictability within a host country and reduced corporate vulnerability to outcries by a socially conscious consumer public. Indirectly, human rights facilitate an environment conducive to the development of human capital, with foreign investors increasingly attracted to countries where they can draw upon high-skilled labor.

Shannon Lindsey Blanton & Robert G. Blanton, *What Attracts Foreign Investors? An Examination of Human Rights and Foreign Direct Investment*, 69 J. of Pol. 143, 153 (2007). Thus, recognizing corporate liability under the ATS will enhance adherence to international law regarding human rights by corporations operating in LDCs. Hence, it can be expected to increase, not decrease, capital flows to those countries.

It is also important to recognize that worldwide efforts to improve LDC labor standards have not produced any measurable declines in FDI in LDCs; indeed, evidence points in the opposite direction—improved labor rights may be associated with greater FDI. *See* David Kucera, *The Effects of Core Workers Rights on Labour Costs and Foreign Direct Investment: Evaluating the "Conventional Wisdom"* 2

(Int'l Institute for Labour Studies, Discussion Paper No. 130 (2001)); Emmanuel Teitelbaum, *Measuring Trade Union Rights Through Violations Recorded in Textual Sources: An Assessment*, 63 Pol. Res. Q. 461, 471–72 (2010). The movement to improve LDC labor standards is, in some ways, analogous to the application of ATS. It seems obvious that a firm is more likely to fall afoul of national laws regarding labor standards than it is to violate international law regarding human rights. Given that improved LDC labor standards have had no measurable impact on FDI, the claim that liability under the ATS will result in a significant decrease in FDI appears far-fetched.

III. CORPORATE LIABILITY FOR ATS CLAIMS WILL NOT FORECLOSE ECONOMIC OPPORTUNITIES FOR U.S. BUSINESSES ABROAD.

It is also said that the creation of a potential new source of legal liability for violations of customary international law could cause U.S. corporations to decrease their investment in areas where, for instance, egregious labor practices or other local or political conditions might increase the risk of liability under ATS. It is further claimed that U.S. corporations would be thereby disadvantaged relative to firms not subject to the jurisdiction of U.S. courts.

Of course, the fact that some countries, such as those with oppressive or abusive regimes, may tolerate egregious practices that might subject firms

to ATS liability does not mean that U.S. firms must engage in such practices or collaborate with the regime, such that they become vulnerable to ATS claims. Beyond this, however, the available evidence does not support the claim that recognition of corporate liability under the ATS would foreclose opportunities for U.S. companies operating abroad.

First, as discussed *supra*, there is no convincing evidence that the possibility of being sued under the ATS for human rights violations has ever deterred companies subject to jurisdiction of our federal courts from investing in countries where the investment would be profitable despite the potential exposure to liability. Moreover, it is important to recall that ATS liability would apply only to those firms that take advantage of such countries' failure to enforce or respect human rights norms.

Second, since a vast number of multinational corporations have at least some business presence in the United States that subjects them to jurisdiction (or at least creates the possibility of jurisdiction), corporate liability under the ATS will not place U.S. firms at a competitive disadvantage relative to those foreign firms. In fact, the ATS may level the playing field for firms *incorporated* in the United States. This is because U.S.-incorporated firms may face greater exposure for violations of state tort law associated with their conduct abroad than foreign

firms that are merely doing business in the United States.[13]

Third, U.S. firms can reap significant benefits from the imposition of ATS liability, particularly where LDC governments are concerned about violations of international law but lack the enforcement tools or local laws to protect against them. In particular, the recognition of corporate liability under the ATS can assure LDC governments that firms subject to the ATS have strong incentives to meet universally accepted minimal standards of conduct. This assurance can significantly increase such firms' access to LDC markets, where governments typically retain considerable oversight over entry by foreign firms.

Fourth, there is evidence to suggest that application of the ATS to U.S. companies that

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[13] This may be so, for example, where the corporation is a state citizen and the state's choice of law provisions dictate a strong state interest in regulating the conduct of state citizens, thus favoring application of state law though the conduct occurred abroad. *Cf. Doe v. Exxon*, 654 F.3d 11, 65–70 (D.C. Cir. 2011) (considering non-federal tort claims brought against, *inter alia*, U.S. corporations for conduct abroad, and applying state choice of law analysis to determine which law applied). While foreign law may be applied to non-federal tort claims, U.S. corporations face a greater risk that tort law of the state in which they reside may be applied compared to foreign corporations that just do business in that state, exposing U.S. corporations to a wider range of tort claims based on their conduct abroad. Therefore, contrary to the contention of some, without corporate liability under the ATS, U.S. firms may be more, not less, disadvantaged relative to foreign firms.

already maintain stringent human rights standards will provide these good corporate citizens with a competitive advantage. This is because laws that create corporate liability do not increase costs for all companies equally. A company that does not need to change its behavior to comply with international law will not incur extra costs of compliance. Recognition of corporation liability under the ATS will put such a company on a more favorable footing than corporations that have not implemented policies and procedures to protect against such violations. Thus, ATS liability might be bad for bad businesses, but it is good for good businesses.

The impact of the Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 U.S.C.), which imposed potentially costly accounting standards on companies operating in the United States, is instructive. In the wake of that Act, some foreign companies chose to delist from U.S. exchanges. Yet several studies found that the firms that delisted in order to avoid compliance with the Act had weaker corporate governance than foreign firms that did not delist. Furthermore, these firms' delisting decisions had economic consequences: their stock price fell relative to those of foreign firms that continued to cross-list. *See, e.g.*, Peter Hostak, *et al.*, *An Examination of the Impact of the Sarbanes-Oxley Act on the Attractiveness of U.S. Capital Markets for Foreign Firms* 28–29 (Sept. 5, 2011) (unpublished manuscript) *available at* http://ssrn.com/abstract=956020. Thus, when the United States creates legal liability for good

corporate behavior, compliant multinational corporations can reap economic benefits. *See* John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. Pa. L. Rev. 229, 231 n.2 (2007) (noting that foreign firms' decision to list in U.S. in spite of additional regulations, disclosure requirements, and stringent enforcement may be the cause of empirically observed U.S. listing premium).

Finally, it is important to recognize that the overriding goal of imposing tort liability for egregious violations of customary international law is to discourage lawbreaking that results in losses in economic and social value. Thus , even if recognition of corporate liability for either direct or secondary violations, such as aiding and abetting egregious conduct by a state, resulted in short-term disinvestment from that state, the costs of such short-term disinvestment should ultimately be outweighed by long-term economic and social gains.

This long-term net gain is demonstrated by U.S. experience with the Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. §§ 78dd-1, *et seq.*, another U.S. law with extraterritorial application. At least one study has demonstrated that U.S. business in some bribery-prone countries fell sharply following the implementation of the FCPA.[14] *See, e.g.*, Paul J.

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[14] The FCPA may have had an impact on U.S. business in bribery prone countries, in part, because of the possibility for *criminal*, as well as civil, penalties, including imprisonment of officers, directors and employees. *See* 15 U.S.C. § 78dd-2(g). Imposition of only civil liability under the ATS would not be expected to have as significant effect.

Beck, *et al.*, *The Impact of the Foreign Corrupt Practices Act on US Exports*, 12 Managerial & Decision Econ. 295, 303 (1991). However, few would suggest that the U.S. should have abandoned its strong anti-bribery stance to avoid the decline in U.S. corporate investment in countries with a history of corruption. Rather, U.S. efforts were directed at ensuring that others adopted similar standards. During the Clinton Administration, *Amicus* was active in promoting such practices at the OECD; these have now indeed become standard. Good businesses now find that the climate for their investment is improved. Furthermore, American businesses, which by and large eschew such corrupt practices, have been the overall beneficiaries: in addition to the more conducive business environment they now encounter, US firms also earn a reputational premium because they are known to be good corporate actors.

Similarly, it may be the case that bad firms willing to perpetrate, participate in, or aid and abet egregious human rights violations may be discouraged from operating in states that tolerate or commit human rights abuses. That should not, however, be an argument against corporate liability under the ATS, but should instead be an argument

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Additionally, the FCPA was enacted at a time when bribery was the norm, or at least not uncommon, in many countries. By contrast, violations of customary international law at issue in modern ATS cases are comparatively rare, and, *Amicus* believes, especially rare among American companies.

for broadening the reach of laws designed to ameliorate these abuses.

IV. CORPORATE LIABILITY FOR ATS CLAIMS WILL NOT AFFECT INVESTMENT IN THE UNITED STATES.

It is also argued that corporate liability under the ATS will cause a decrease in investment in the U.S. as foreign companies seek to avoid personal jurisdiction in U.S. federal courts, and thus, the reach of the law. According to this spurious logic, courts should reject corporate liability under the ATS because corporations would not initiate new business opportunities in the United States if they were to be held accountable for injuring others through their operations abroad. This argument, however, has little economic support; most, if not all, properly valued investments (with positive risk-adjusted net present value) in the United States and abroad will proceed.

Moreover, the threat of foreign corporations withdrawing from, or declining to invest, in the United States would have a significant economic impact only if there were large numbers of foreign companies with access to technology, knowledge, or resources that were not available to U.S. firms. Because there are few—if any—niches in the U.S. market for which these conditions hold true, any decrease in investment by the foreign firm would be offset by increased investment by American firms. Hence, even if one were to assume, *arguendo*, that foreign firms might decrease their investment in the

United States, such disinvestment would not have a significant negative impact on the U.S. economy.

Similarly specious reasoning lies behind the claim that the specter of frivolous lawsuits favors rejecting corporate liability under the ATS. Like any other tool used to elicit appropriate behavior, tort law has costs and benefits. On the benefit side, it is often a more efficient means than regulation for creating accountability and inducing appropriate behavior. On the cost side, there is frivolous litigation. But the cost of using regulation to prevent human rights violations in countries with weak or poor records with respect to governance is likely to be much greater, if such regulation is even feasible.

Properly applied, tort law achieves the objective of promoting good behavior and accountability with benefits that exceed the costs. Moreover, the number of claims under the ATS is constrained by the law's limitation to only the most universally accepted (and thus most egregious) human rights violations[15] and

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[15] *See Sosa*, 542 U.S. at 732 (only claims for violation of norms that are "specific, universal, and obligatory" are actionable under the ATS) (quoting *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994)); *see also Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 159 (2d Cir. 2010) (Leval, J., concurring in the judgment) ("Suits alleging ordinary, less repugnant, less universally condemned torts . . . will be dismissed whether brought against a natural person or a corporation because of failure to plead a violation of the law of nations."), *cert. granted*, 132 S. Ct. __ (2011) (No. 10-1491). The Chamber of Commerce itself admits that in more than two decades of modern application of the ATS to human rights violations,

the likelihood that suits would be limited to those brought by residents of, and for conduct occurring in, countries with the weakest legal systems, where domestic redress is unavailable.

In any case, the assertion that recognition of corporate liability for ATS claims would cause foreign companies to flee the U.S. arises from a naive model that fails to account for the many considerations that drive a firm's decision about where and how to invest. As noted above, these considerations include overall business climate, access to infrastructure, access to capital, labor, and natural resources, governmental attitudes towards business, and broader social and political stability. The U.S. economy offers, among other economic advantages, access to sophisticated capital markets, an educated labor pool, and the purchasing power of United States consumers. Given the scope of the U.S. economy, large, multinational businesses effectively have no choice but to locate some operations or conduct some business in the U.S. Thus, the benefits of operating in the U.S. are likely

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just over 150 claims have been filed against corporations, or, on average, only about seven suits annually, *Flomo* Chamber Br., 2011 WL 2452309, at 22, amid the 200,000 to nearly 300,000 civil cases filed annually in our federal courts over that period, *see* United States Courts, Judicial Facts and Figures 2010, tbl. 4.1 (217,879 civil cases filed in 1990; 282,895 civil cases filed in 2010), http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2010/Table401.pdf.

to outweigh any potentially increased costs of doing business here.

V. CORPORATE LIABILITY UNDER THE ATS IS AN ECONOMICALLY EFFICIENT MEANS OF DISCOURAGING VIOLATIONS OF UNIVERSALLY RECOGNIZED PRINCIPLES OF INTERNATIONAL LAW.

The analysis above indicates that recognizing corporate liability for ATS claims will not harm economic development of LDCs, U.S. businesses operating abroad, or investment in the U.S. The net economic value generated by firms that violate fundamental human rights is dubious at best, and the broader adverse effects of these firms' legal violations are unambiguous. From a global perspective, competition based on such violations distorts the global marketplace. U.S. firms, the U.S. economy, and U.S. values are enhanced by discouraging such distortions.

Given this, recognizing corporate liability under the ATS is an economically efficient means of allowing firms to compete fairly in a global economy while enhancing social welfare and conforming to standards of international law. The research on sanctions for behavior that violates international law has recognized the value of penalties that focus their impact on the perpetrators of harmful actions while minimizing any collateral damage to the general population. Promoting individual accountability for unlawful actions is both more fair and effective than blanket sanctions or embargoes. *See* Watson Inst. for

Int'l Studies, Brown U., *Strengthening Targeted Sanctions Through Fair and Clear Procedures* 5 (Mar. 30, 2006), *available at* http://www.watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf.

Currently, various sanctions that are targeted at persons and firms have become part of the general operations of the United Nations and other international regulatory agencies. Such penalties include financial sanctions, travel and aviation bans, embargoes on particular commodities, and so on. ATS liability for corporations is an extension of these efforts. However, unlike targeted sanctions, which require state approval, recognizing ATS liability for corporations allows private actors to draw attention to and penalize firms that violate international law. This is efficient because it draws upon private information and incentives, just as whistleblower laws do. In cases where local governments are unable or unwilling to reprimand multinational corporations, ATS liability allows for a credible and efficient deterrent to the most egregious human rights violations. ATS liability thus functions as an independent, judicially enforced deterrent to violations of, and safeguard for, basic human rights, while enhancing social welfare and economic value in the long term.

CONCLUSION

For the foregoing reasons, this Court should reject policy arguments asserting adverse economic consequences from corporate liability under the ATS

and the TVPA, and reverse the judgments of the Courts of Appeals for the Second Circuit and the District of Columbia.

Respectfully submitted,

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